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NO. 83-1815

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the court of appeals is in conflict with previous decisions of the Supreme Court regarding the *stricti juris* nature of maritime liens.

2. Whether a bareboat charterer can acquire a lien on the vessel under charter.

3. Whether a lien prohibition clause which denies the charterer any right to permit "any liens whatsoever" is a waiver of liens by the charterer.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption. First Mississippi National Bank is a wholly-owned subsidiary of First Mississippi National Corporation and an affiliate of Bienville Insurance Company and Continental Leasing Corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i
List of Parties ii
Table of Contents iii
Table of Authorities iv
Reports of Opinions Below 1
Grounds for Jurisdiction in the Supreme Court 1
Statutory Provision Involved 2
Statement of the Case 2
Basis for Federal Jurisdiction in the District Court 5
Reasons for Allowance of the Writ 5
Conclusion 12
Certificate of Service 13
Appendix A—Order of Court of Appeals denying Petition for Rehearing, January 30, 1984 ..... A-1
Appendix B—Decision of Court of Appeals Reversing and Remanding, December 22, 1983 ..... A-3
Appendix C—Opinion of District Court, March 16, 1982 ..... A-18
Appendix D—Judgment of District Court, March 16, 1982 ..... A-24

TABLE OF AUTHORITIES

CASES: **PAGE**

Challenger, Inc. v. Durno,
227 F.2d 918 (5th Cir. 1955) 10
Frontera Fruit Co. v. Dowling,
91 F.2d 293 (5th Cir. 1937) 9
Guzman v. Pichirilo,
369 U.S. 698, 82 S.Ct. 1095, 14 ALR Fed.
544 (1962) 8
Klishewich v. Mediterranean Agencies, Inc.,
302 F.Supp. 712 (E.D. N.Y. 1969) 8
Petersen Towing Corp. v. Capt. Abrams, Inc.,
388 F.Supp. 1166 (E.D. N.Y. 1975) 9
The SAIGON MARU,
260 U.S. 490, 43 S.Ct. 172, 67 L.Ed. 364 (1923) 6
Sasportes v. M/V SOL DE COPACABANA,
581 F.2d 1204 (5th Cir. 1978) 9
Schilling v. A/S D/S Dannebrog,
320 F.2d 628 (2nd Cir. 1963) 8
TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA, 509 F.Supp. 1072 (E.D. Tex. 1981), *reversed in part on other grounds*, 696 F.2d
1135 (5th Cir. 1983) 12
The YANKEE BLADE,
60 U.S. (19 How.) 82, 15 L.Ed. 554 (1857) 6

STATUTES:

28 U.S.C. §1254(1) 2
28 U.S.C. §1333 5
46 U.S.C. §972 10
46 U.S.C. §974 . . . . . 2, 11

MISCELLANEOUS:

Allen, *Liens: Liabilities Arising from Delay or Failure in Performance*, 49 Tul. L. Rev. 970
(1975) 7
G. Gilmore & C. Black, *The Law of Admiralty*,
239 (2nd ed. 1975) 7

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FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

First Mississippi National Bank, through undersigned counsel, petitions for a Writ of Certiorari to review the decree of the United States Court of Appeals for the Fifth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the court of appeals (Appendix, p. A-3) is reported at 722 F.2d 126. The opinion of the district court (Appendix, p. A-18) is not reported.

GROUNDS FOR JURISDICTION IN THE SUPREME COURT

The decree sought to be reviewed is dated December

22, 1983 (Appendix, p. A-3). A petition for rehearing was filed on January 5, 1984, and denied on January 30, 1984 (Appendix, p. A-1). The certiorari jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Maritime Lien Act, 46 U.S.C. §974, provides in relevant part:

> "Nothing in this chapter shall be construed to prevent the furnisher of repairs...or other necessaries...from waiving his right to a lien..." 46 U.S.C. §974.

STATEMENT OF THE CASE

This action originated in Jacksonville, Florida, where the M/V KING'S CHALLENGER was arrested on August 31, 1978 in connection with the foreclosure of a preferred ship mortgage by First Mississippi National Bank ("FMNB"). International Marine Towing, Inc. ("IMT") intervened in the action to assert a claim for breach of the bareboat charter under which the vessel was operating at the time it was arrested. Several other parties also intervened, and Southern Leasing Partners, Ltd. ("SLP") claimed the vessel as owner.

In December of 1978, all of the various parties to the action, except for IMT, were able to reach agreements to settle the litigation. This included payment of some small claims, bonding of deductibles on some personal injury claims, and withdrawal without prejudice of the claims of FMNB and the second mortgage holder. Each of these settlements were contingent upon the release of the vessel

from arrest, which in turn required successful conclusion of settlements on all of the other claims. Since it was not possible for the parties to agree on a settlement of the IMT claim, the court ordered the vessel released on the posting of a $50,000 bond to secure the IMT claim against the vessel *in rem*. The end result was that the only parties remaining active in the action were IMT and SLP. At that point, an order was obtained transferring the Jacksonville action to New Orleans for consolidation with a similar action brought by IMT against SLP. FMNB was not a party to this transfer.

Subsequent to the transfer of the Jacksonville action to New Orleans, the first preferred ship mortgage in favor of FMNB again went into default, and FMNB again foreclosed, in Jacksonville. After trial, the court in Jacksonville determined that the claim of FMNB constituted a valid and subsisting first preferred ship mortgage lien, and awarded judgment to FMNB to that effect. That has resulted in a sale by the United States Marshal, free and clear of liens. IMT declined to intervene in the second proceeding, or to have the ranking and validity of its claim adjudicated vis-a-vis that of FMNB and the other parties to that action.

The consolidated actions in New Orleans came up for trial on September 21, 1981. Up to that point, SLP had been vigorously defending against the claim of IMT. The only evidence taken at the trial, however, was that required for a judgment by default against third-party defendant Jay Freedman. IMT and SLP advised the court at that time that they had reached a settlement agreement. An order of dismissal was entered, and the case was closed, the order reciting that the court had been advised by counsel that the action had been settled, and dismissing the action

"without prejudice to the right, upon good cause shown within 60 days, to reopen the action if settlement is not consummated." This order was apparently entered on the belief that the parties had settled their controversy, and that no further action by the court would be necessary. No objection was made to the order, nor did the parties seek to have the order modified in any respect. At this point, the docket sheet was marked "closed case". On November 24, 1981, sixty days to the day after the entry of the dismissal order, a stipulation of findings of fact and conclusions of law was filed by IMT and SLP. This stipulation was approved by the court, apparently on the belief that the case was still open and that all interested parties had agreed to the stipulation. Such was not the case.

At the request of FMNB, a conference was held in chambers on December 1, 1981, at which the district judge concluded that the case should be reopened for consideration of the bond. Pursuant to the instructions of the district judge, FMNB filed on December 11, 1981, its motion to recall and vacate the court approval of the stipulation of findings of fact and conclusions of law filed on November 24, 1981, and to cancel and discharge the release bond dated January 10, 1979 in the amount of $50,000 posted by FMNB. In due course, the district judge issued his opinion and judgment, vacating the stipulation of fact and law of November 24, 1981 insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. The motion of IMT to alter and/or amend the judgment was denied on April 28, 1982, after which appeal was taken by IMT.

Since IMT and SLP had settled the *in personam* claims, the only parties remaining in the litigation were IMT and FMNB, in its capacity as principal on the release

bond securing the *in rem* claim. The judgment of the district court was therefore a final disposition of the case. The reversal by the court of appeals, on the other hand, remands the case to the district court for further proceedings, which would include such factual determinations as would establish whether IMT has a valid lien claim. A ruling on this petition is fundamental to the further conduct of the case, since reversal at this point would, once again, effect a final disposition of the case.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This action involves the breach of a charter on a vessel, particularly the question of whether a lien arises for such breach, and the action accordingly falls within the admiralty and maritime jurisdiction of the courts of the United States under 28 U.S.C. §1333.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the court of appeals is in conflict with previous decisions of the Supreme Court regarding the *stricti juris* nature of maritime liens.

This case presents a conflict between two fundamental notions of admiralty law. On the one hand, it is well settled that a bareboat charterer is an owner *pro hac vice*, and as such can acquire no lien on the vessel under charter. On the other hand, it is also well settled that a charterer generally is entitled to a maritime lien on the vessel under charter for breach of the charter. The court of appeals has decided in the present case that a bareboat charterer is entitled to the same lien rights as other types of charterers.

To do this, the court of appeals ignored jurisprudence regarding the distinctions among types of charters, and went to the extreme of carving out an exception to the general rule precluding liens in favor of bareboat charterers. The court of appeals began by noting that cases on the point are "sparse" (Appendix, p. A-11), then noted (erroneously) that "persuasive authority exists for the proposition that a bareboat charterer can maintain a lien for the owner's breach" (Appendix, p. A-12), then proceeds to attempt to distinguish the cases cited by the district court as "not controlling" (Appendix, p. A-13). Such extension of lien rights by construction, in the absence of clear precedents, is contrary to the directions of the Supreme Court:

> "The maritime privilege or lien...is...stricti juris and cannot be extended by construction, analogy or inference." *The SAIGON MARU,* 260 U.S. 490, 499, 43 S.Ct. 172, 174, 67 L.Ed. 364 (1923).

See also *The YANKEE BLADE,* 60 U.S. (19 How.) 82 15 L.Ed. 554, 556 (1857). The prior decisions of the Supreme Court prohibit the extension of lien rights through the guise of an exception to a recognized rule. The decision of the court of appeals in the present case is therefore in conflict with applicable decisions of the Supreme Court, and for that reason, this petition for writ of certiorari should be granted.

II.

A bareboat charterer is an owner *pro hac vice,* and as such cannot acquire a lien on the vessel under charter.

There are far-reaching differences between bareboat

charters on the one hand and voyage and time charters on the other hand. Professors Gilmore and Black draw such a distinction:

> "The fact that the demise charter bears the same generic name as the time and voyage charters...is likely to lead one into thinking of the demise as quite similar in practical use and legal import to the other two. Nothing could be farther from the truth; a better first approximation would be to say that the demise is linked to the time and voyage charters only by an *accident of nomenclature...*" G. Gilmore & C. Black, *The Law of Admiralty* 239 (2nd ed. 1975) (emphasis added).

The quotation used by the court of appeals, (Appendix, p. A-11) is found at page 631 of the Gilmore and Black treatise, and all of the cases cited in the footnote supporting that quotation deal with other than bareboat charters. The language quoted above must be taken into consideration in reviewing the rest of the treatise. Having drawn the distinction between bareboat charters and other types of charters, the authors clearly decided that it would be redundant for them to raise the distinction each time a point was being made. That approach was expressly taken in Allen, *Liens: Liabilities Arising From Delay or Failure in Performance,* 49 Tul. L. Rev. 970 (1975), where the Mr. Allen begins by noting that bareboat charters "present a different problem", then goes on to write that the subject of liens under a bareboat charter "will not be pursued further herein". 49 Tul. L.Rev. at 971, n.6. In other words, both of these authorities note that bareboat charters are distinct, then proceed to discuss charters in general, it being understood that bareboat charters are different, and not included in the general discussion.

This distinction between types of charter has been recognized by the Supreme Court:

> "[A demise (bareboat) charter is] tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. While *a demise may bring about a change in the respective legal obligations of the owner and demisee...*" *Guzman v. Pichirilo*, 369 U.S. 698, 700, 82 S.Ct. 1095, 1096, 14 ALR Fed. 544 (1962).

Other courts have also recognized the distinction between types of charter. For example, the United States Court of Appeals for the Second Circuit has noted that "*in contrast to a demise charter*...the landlord and tenant analogy is not entirely apt as applied to an ordinary time charter..." *Schilling v. A/S D/A Dannebrog*, 320 F.2d 628, 630 (2nd Cir. 1963) (emphasis added). Also, the United States District Court for the Eastern District of New York has noted, "This difference in concept between demise and time charters beings forth significant differences in the obligations of demise and time charterers." *Klishewich v. Mediterranean Agencies, Inc.*, 302 F.Supp. 712, 713 (E.D. N.Y. 1969).

One reason bareboat charterers are distinct is that they are regarded as owners. The Fifth Circuit itself has explained the reasoning behind this point of law:

> "Joint venturers cannot hold maritime liens because they are not 'strangers to the vessel,'... but rather occupy a position akin to that of the vessel's owner....Such a party may, of course, have an *in personam* contract claim against the

> true owner. But when the seas get rough one who looks, acts and profits like an owner cannot retreat to the relative safe harbor of a maritime lienor, who of course has a claim against the ship itself." *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204, 1208-09 (5th Cir. 1978).

The bareboat charterer, or owner *pro hac vice*, is not a "stranger to the vessel", and therefore cannot rely on the credit of the vessel, but must rely on its "*in personam* contract claim" against the owner.

Despite such language in previous decisions, the court of appeals in the present case held in favor of a maritime lien for the bareboat charterer. To support this finding, the court of appeals first cited *Petersen Towing Corp. v. Capt. Abrams, Inc.*, 388 F.Supp. 1166 (E.D. N.Y. 1975), and noted that *Petersen* held that "the plaintiffs were entitled to a maritime lien for breach of the charter". (Appendix, p. A-12-13.) That is an erroneous reading of *Petersen*, which actually holds that "the plaintiffs are entitled to the position of a maritime lienor *as a repairman*". 388 F.Supp. at 1169 (emphasis added). It seems that the plaintiff in *Petersen* was not claiming a lien under the bareboat charter, but was claiming a lien under a separate agreement through which the plaintiff undertook to make repairs for the account of the owner, prior to consummation of the bareboat charter. This is not persuasive authority for the proposition that a bareboat charterer can maintain a lien for the owner's breach.

There are few reported cases dealing with lien claims arising on bareboat charters, but at least two decisions by the Fifth Circuit have addressed the subject. In *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir. 1937), the court disregarded the "time charter" label which Frontera gave

to its contractural arrangement for the use of the vessel. The contract provided that the master and the crew should be considered the agents of Frontera, and the court therefore found that Frontera was in the position of an owner *pro hac vice*, the term often used to describe the relationship of a bareboat charterer to the vessel. The court went on to note:

> "Appellant, having the exclusive management and control of the vessel, bore the relationship of owner. While this relationship existed, appellant could not acquire any interest which would prejudice the mortgage lien retained by the seller. In these transactions it dealt with itself on the account of the ship, and *no maritime lien could be asserted in its favor*." 91 F.2d at 296 (emphasis added).

In *Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir. 1955), a mortgagee in possession of a vessel sought to have substantial expenses recognized as part of its lien against the vessel. The expenses exceeded what was reasonably allowable under the mortgage, and the mortgagee was therefore claiming an ordinary maritime lien. The court found that the mortgagee would not have the right of one to whom management of the vessel was entrusted, under 46 U.S.C. §972, to incur liens. The final paragraph of footnote 2 to the decision is directly on point:

> "His status is comparable here to a charterer pro hac vice who *can acquire no maritime lien* in his own behalf." 227 F.2d at 921 (emphasis added).

It is therefore well settled that a bareboat charterer, such as IMT in the present case, stands in the shoes of an owner and cannot acquire a lien on the vessel under charter.

III.

The lien prohibition clause in the charter is a waiver of liens by the charterer.

Section 7.3 of the charter on the M/V KING'S CHALLENGER contains the following lien prohibition clause:

> "Neither the charterer nor the master of the vessel shall have any right, power or authority to sell, assign, or transfer, or to create, incur or *permit to be imposed* upon the vessel *any liens whatsoever* except for crews wages and salvage and inchoate operating expenses not discharged within sixty days from incurrence." (Appendix, p. A-15-16) (emphasis added).

This language is a clear and unequivocal waiver of any lien in favor of the charterer, and such a waiver is specifically permitted by the Maritime Lien Act:

> "Nothing in this chapter shall be construed to prevent the furnisher of repairs...or other necessaries...from waiving his right to a lien..." 46 U.S.C. §974.

The court of appeals took the position that the clause does not prohibit the creation of a lien in favor of the charterer for the owner's breach of the charter party, but this position overlooks the language in the clause which not only prohibits the charterer from imposing a lien, but also prohibits the charterer from permitting a lien to be imposed. In other words, the charterer is charged with the responsibility of preventing the imposition of liens on the vessel.

A third party with actual knowledge of such a lien prohibition clause in a charter will not be permitted to acquire a maritime lien on the vessel. *TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA*, 509 F.Supp. 1072 (E.D. Tex. 1981), *reversed in part on other grounds*, 696 F.2d 1135 (5th Cir. 1983). Now, according to the decision of the court of appeals in the present case, the bareboat charterer, who is pledged to prevent the imposition of liens on the vessel, is in a better position than a third party, and all this only for the sake of maintaining a lien which should not have been extended in the first instance.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be allowed.

Respectfully submitted,

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April 27, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 1983, three copies of the foregoing Petition for Writ of Certiorari have been served by hand delivery pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, on opposing counsel as indicated below:

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Attorneys for International Marine Towing, Inc.

Accordingly, all parties required to be served have been served.

_____

W. E. NOEL

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3348

INTERNATIONAL MARINE TOWING, INC.,

Plaintiff-Appellant,

versus

SOUTHERN LEASING PARTNERS, LTD., ETC., ET AL.,

Defendants-Appellees.

FIRST MISSISSIPPI NATIONAL BANK,

Plaintiff-Appellee,

versus

INTERNATIONAL MARINE TOWING, INC.,

Intervenor-Plaintiff-Appellant,

versus

M/V KING'S CHALLENGER, her engines, tackle, apparel, ETC., *in rem*,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(JANUARY 30, 1984)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Signed
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3348

INTERNATIONAL MARINE TOWING, INC.,

Plaintiff-Appellant,

v.

SOUTHERN LEASING PARTNERS, LTD., ETC., ET AL.,

Defendants-Appellees.

FIRST MISSISSIPPI NATIONAL BANK,

Plaintiff-Appellee,

v.

M/V KING'S CHALLENGER, her engines, tackle, apparel, ETC., *in rem*,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(DECEMBER 22, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

RANDALL, Circuit Judge:

This appeal involves the breach of a bareboat charter party. The issue presented for our determination is whether a maritime lien arises in favor of the charterer for the owner's breach of the charter party. Appellant International Marine Towing, Inc. ("IMT") contends that the district court erred in holding that IMT could not acquire a lien on the M/V KING'S CHALLENGER for breach of a charter party as a matter of law and as a result of a "prohibiton of liens" clause in the charter party. IMT also alleges that the district court erroneously allowed appellee First Mississippi National Bank ("FMNB") to interpose an objection to a settlement entered into between IMT and Southern Leasing Partners, Ltd. ("Southern Leasing").

For the reasons stated below, we find that the district court properly allowed FMNB to object to the settlement between IMT and Southern Leasing. The district court erred, however, in holding that IMT was not entitled to a lien for damages suffered as a result of Southern Leasing's breach of the charter party. Thus, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This action originated in Jacksonville, Florida, where the tug M/V KING'S CHALLENGER was arrested in connection with the foreclosure of a preferred ship's mortgage by FMNB. The M/V KING'S CHALLENGER was owned by Southern Leasing, but, at the time of the arrest, the vessel was under a bareboat charter to IMT. Prior to the arrest, IMT had made substantial expenditures in outfitting and repairing the tug so as to make the vessel seaworthy and fit for its intended use. IMT had also engaged the M/V

KING'S CHALLENGER in a number of profitable towing operations. Once the tug was seized, IMT intervened, by way of an *in rem* proceeding against the vessel, to assert a claim for damages caused by the breach of the bareboat charter party. Several other parties also intervened, and eventually all parties to the action except IMT agreed to settle the litigation. It was decided that the vessel would not be sold but would be released for operation in order to obtain funds to pay various claims. A cash bond was posted by FMNB to secure IMT's claim, and the vessel was released. Thereafter, a corporate surety bond was substituted for the cash bond with FMNB as principal and the Federal Insurance Company as surety.

In addition to its *in rem* action filed in Florida, IMT filed an *in personam* action against Southern Leasing in New Orleans, Louisiana. The *in rem* action was then transferred to New Orleans and consolidated with the *in personam* proceeding. Meanwhile, in Jacksonville, FMNB foreclosed on its preferred ship's mortgage, alleging that Southern Leasing had breached the settlement agreement. The vessel was seized a second time and was sold to satisfy FMNB's judgment against Southern Leasing.

IMT's consolidated action was scheduled for trial, but IMT and Southern Leasing reached a settlement agreement as to IMT's suit for breach of the bareboat charter by Southern Leasing. An order of dismissal was entered and a stipulation of fact and law[1] was filed by the two parties

[1] The conclusions of law state:

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any disputes which

and approved by the district court. FMNB made a motion to recall approval of the stipulation of fact and law, and to cancel the $50,000 release bond it had posted before IMT's

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(Footnote 1 continued)
may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE,* 390 F. Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yahct HUCKSTER,* 249 F. Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The First Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement, and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather,* 97 U.S. 379, (1878). Since there were (sic) no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim. *Jordan v. Mayro N.E. Drilling, Mud, Chemical, and Engineering Service,* 214 F.2d 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER Only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem,* in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

actions were consolidated. FMNB asserted that the stipulation was erroneous as a matter of law in that it gave IMT a lien on the vessel and therefore the bond as a bareboat charterer. FMNB also maintained that such a lien was contrary to the "prohibition of liens" clause in the charter party. The district court set aside the stipulation insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. IMT appeals, contending that FMNB had no standing to intervene in the suit, and that the district court erred in holding IMT could not acquire a lien for breach of the charter party.

II. INTERVENTION OF FMNB.

The threshold question presented by this appeal is whether FMNB had standing to challenge the settlement entered into by Southern Leasing and IMT.[2] Before addressing this issue, however, it is necessary for us to consider the effect of FMNB's failure to comply with the procedure for intervention established by Federal Rules of Civil Procedure 24(c).[3] Although some courts have held that is reversible error to conduct any proceedings at the behest of parties who have failed to intervene formally pursuant to rule 24(c), *see, e.g., Spangler v. Pasadena City Board of Education,* 552 F.2d 1326 (9th Cir. 1977), other courts have been willing to ignore technical flaws in the

[2] In its brief, FMNB contends that the issue of FMNB's standing was not raised by IMT before the district court, and therefore cannot be raised on appeal. After reviewing the record we find the contrary; the issue of FMNB's standing was clearly raised in IMT's motion in opposition to cancel the bond.

[3] The original briefs of the parties did not discuss this issue; however, we found it sufficiently important to raise *sua sponte, see In re Beef Industry Antitrust Litigation,* 589 F.2d 786, 788 n.2 (5th Cir. 1979), and ask for supplemental briefing on this question by the parties.

intervention process, *see, e.g., Smartt v. Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), *cert. denied*, 380 U.S. 934 (1965), or have been willing to overlook a total failure to comply with Rule 24(c). *See, e.g., SEC v. Lincoln Thrift Association*, 577 F.2d 600 (9th Cir. 1978); *Roach v. Churchman*, 457 F.2d 1101 (3th Cir. 1972).

We have been lenient in hearing the appeals of parties who have failed to fulfill the provisions of rule 24(c). *See In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (trial court implicitly authorized intervention of nonparties when it denied nonparties' motion to modify protective order so that party could comply with House of Representatives subpoena for documents); *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969) (nonparty allowed to appeal denial of motion for permission to inspect and copy reports sealed under protective order); *Caswell v. Manhattan Fire & Marine Insurance co.*, 399 F.2d 417 (5th Cir. 1968) (nonparty allowed to appeal denial of motion to quash subpoena).

When FMNB first learned that IMT and Southern Leasing had settled their dispute, it asked that a conference be held in chambers. During this conference, the district court concluded that the case should be reopened for consideration of the bond. The court then directed FMNB to submit a brief on this issue, giving IMT ten days to respond. Record Vol. V at 1143. This could be construed as an invitation to FMNB to file its motion without first seeking formal intervention. *See In re Beef Industry Antitrust Litigation, supra*, at 789. *Compare Roach v. Churchman, supra*, at 1104 (affording relief to a participant without formally naming it as a party deemed "equivalent to authorizing" intervention). In view of our lenience in the

past and the fact that the district court's act might be considered equivalent to authorizing intervention, we will not dismiss for failure to comply with Rule 24(c). Instead, we will assume that the district court implicitly allowed FMNB to intervene.[4] We stress, however, that FMNB should have filed a formal motion for intervention pursuant to Rule 24(c), and that future litigants should not rely upon this decision as a means to circumvent the clear requirements of the rule.

We now turn to IMT's assertion that FMNB lacked standing to interpose an objection to the stipulation filed with the district court. IMT contends that FMNB is a mere surety for any *in rem* judgment rendered against Southern Leasing for IMT and, as such, had no right to intervene. In support of its position, IMT cites several cases purportedly standing for the proposition that sureties on a stipulation for the release of a vessel have no right to defend the bond and thus may not intervene. *The L.I.R.R. No. 18,* 67 F.2d 290 (2d Cir. 1933); *The Cartona,* 297 F. 827 (2d Cir. 1924); *The Lydia,* 1 F.2d 18 (2d Cir.), *cert. denied,* 266 U.S. 616 (1924); *Perriam v. Pacific Coast Co.,* 133 F. 140 (9th Cir. 1904); *The New York,* 104 F. 561 (6th Cir. 1900); *The Glide,* 72 F. 200 (4th Cir. 1896). Most of these cases, however, do not support the position that a surety cannot appear; the cases instead stand for the proposition that the claimant of a vessel may appeal alone, without the participation of its surety. *See, e.g., The L.I.R.R. No. 18, supra; The Lydia, supra; Perriam v. Pacific Coast Co., supra; The New York, supra; The Glide, supra.* Moreover, these cases would be more apposite if the Federal Insurance Company,

[4] In its supplemental brief, see note 3, *supra,* IMT raises certain objections to FMNB's intervention, such as timeliness, which were not raised in the district court below. Thus, we will not consider them on appeal.

surety of the release bond posted by FMNB, had sought to intervene. Here, FMNB has a direct interest in the outcome of IMT's suit, as it posted the bond as principal and will bear the cost of an *in rem* judgment against Southern Leasing.[5]

Therefore, we hold that FMNB had sufficient standing to intervene in the action between IMT and Southern Leasing, and that FMNB is a party to the case.

III. MARITIME LIENS ARISING FROM BREACH OF THE CHARTER PARTY.

The term "charter party," often shortened to "charter," refers to the document setting forth the terms of a contract when one person (the "charterer") takes over the use of the whole ship belonging to another (the "owner"). G. Gilmore & C. Black, *The Law of Admiralty*, § 4-1 at 193 (2d ed. 1975). There are three generally recognized types of charter parties: the first two, the "voyage charter" and the "time charter," occur when the vessel is manned and navigated by the owner. In the voyage charter the ship is engaged to carry a full cargo on a single voyage, whereas in the time charter the charterer engages the ship to carry cargo over a fixed period of time. The third charter is known as a "bareboat" or "demise charter." In this arrangement, the charterer operates the ship and is regarded as the owner of the ship *pro hac vice*.[6] *Id.*

Cases that address the charterer's right to a maritime

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[5] Neither FMNB nor IMT cited any cases either granting or denying the principal on a release bond the right to defend the bond (replacing the vessel) in pending litigation. The lack of authority on this issue is not surprising—usually the claimant of a seized vessel is also the principal on the bond.

[6] "For this turn; for this one particular occasion." *Black's Law Dictionary* 1091 (rev. 5th ed. 1979).

lien due to the owner's breach of the bareboat charter are sparse. Professors Gilmore & Black, in listing claims which give rise to maritime liens, include:

> *Charter-parties*...[L]iens arise for breach of charter-party in either direction. The charterer has a lien on the vessel for owner's breach; the owner may have a lien on cargo...for charterer's breach (which is usually non-payment of the charter-hire).

G. Gilmore & C. Black, *supra*, § 9-20 at 631 (footnote omitted).[7]

The fact that the charter party between IMT and Southern Leasing is a bareboat charter does nothing to eliminate the essential maritime nature of the agreement, nor the legal consequences arising therefrom. Although the bareboat charterer might be characterized as the owner *pro hac vice* as to third parties, the charterer is still the charterer as to the vessel owner and is thus entitled to a maritime lien against the vessel for the owner's breach of the charter party. In *The Oceano*, 148 F. 131 (S.D.N.Y. 1906), the court allowed the time charterer to proceed *in rem* against the vessel when the owner refused to refund excess advances made by the charterer. In *Rainbow Line, Inc. v. M/V Tequilla*, 480 F.2d 1024 (1973), the ship owner prematurely withdrew the vessel from service and the charterer sought damages for breach of the time charter.

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[7] Although the cases cited as authority involve non-bareboat charters, the authors do not limit liens for breach to time and voyage charters. Discussion in other treatises on maritime liens arising from breach of bareboat charters are equally oblique. See 2 *Benedict on Admiralty*, 3-54, § 43 (1981). The dearth of authority on this issue is noted by Hervey Allen in *Liens: Liabilities Arising from Delay or Failure in Performance*, 49 Tul. L. Rev. 970 (1975), where he observes "there is a dearth of case law on liens under a demise charter." At 971 n.6.

The court held that the charterer had a maritime lien against the vessel for the breach of the charter, noting:

> The American law is clear that there is a maritime lien for the breach of a charter party, and because the damages sought to be recovered by [the charterer] are all of a maritime nature and flow directly from the breach of the charter, it has a maritime lien.
>
> The Supreme Court, in dicta, in *The Schooner Freeman v. Buckingham,* 59 U.S. 182, 190, 15 L.Ed. 341 (1955), stated that "charter parties, must, in the invariable regular course of...business, be made, for the performance of which the law confers a lien on the vessel."

480 F.2d at 1027 (footnotes omitted).[8]

Although *Rainbow* involved the breach of a time charter, we find the court's language applicable to bareboat charters as well: "Because the damages sought to be recovered by [the charterer]...flow directly from the breach of the charter, it has a maritime lien." *Id.*

Persuasive authority exists for the proposition that a bareboat charterer can maintain a lien for the owner's breach, although these cases do not directly address this issue. In *Petersen Towing Corp. v. Capt. Abrams, Inc.,*

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[8] We note, as did the court in *Rainbow,* that there is no lien for breach if the charter party is an executory contract. *Id.* at 1027 n.6. In the present case, the vessel had been delivered before its seizure to IMT and IMT had used the boat for a number of towing operations. Delivery of the vessel commences the performance of a time charter and removes it from executory status. *Id.* Delivery of the vessel to the charterer and its use by the same also commences the performance of a bareboat charterer as so to remove its executory status.

388 F. Supp. 1166 (1975), the plaintiffs claimed to be maritime lienors when the owner breached a bareboat charter by prematurely removing the tug from service. The owner maintained that the charter party had never been executed, and that a maritime lien could not attach to this contract. The court, citing *Rainbow Lines, Inc. v. M/V Tequilla, supra,* held that the vessel had been delivered to the charterer, and that the charter party was not executory. Thus, the court held that the plaintiffs were entitled to a maritime lien for breach of the charter.

Similarly, in *Florida Yacht Brokers, Inc. v. Yacht Huckster,* 249 F. Supp. 371 (S.D. Fla. 1965), plaintiffs entered into a bareboat charter with the owner of a yacht. After execution of the charter, it was breached by the owner. The court held that the plaintiffs had a lien on the vessel for damages arising from the cancelled contract, as well as for the cost of work and materials furnished the vessel.

In the case before us, the district court concluded that four cases from this circuit prevent IMT from acquiring a lien for Southern Leasing's breach of the charter party: *Frontera Fruit Co. v. Dowling,* 91 F.2d 293 (5th Cir. 1937); *Challenger, Inc. v. Durno,* 227 F.2d 918 (5th Cir. 1955); *Saspartes v. M/V Sol de. Cocacabana,* 581 F.2d 1204 (5th Cir. 1978); and *Roberts v. Echternach,* 302 F.2d 370 (5th Cir. 1970). We find that none of these cases involves the breach of a bareboat charter by the owner and thus the cases are not controlling.

In *Frontera Fruit Co. v. Dowling, supra,* the charterer was in a joint venture with the owner of the boat, and the charterer sought to place a lien on the vessel for wages advanced to the ship's crew. We held a joint

venturer cannot acquire a lien for advances since he is primarily liable for the vessel's indebtedness. Since IMT was not a joint venturer with Southern Leasing, this case is inapplicable.

Challenger v. Durno, supra, held that a mortgagee in possession of a vessel could not create a maritime lien in its favor by paying materialmen and ship repairers for work and services ordered by him and taking assignment of their rights. *Durno* involved the authority of a mortgagee to subject the vessel to liens by third parties and thus does not bear on the issue at hand. FMNB does, however, direct our attention to footnote 2 of the *Durno* opinion, which states that the mortgagee's status as one in control of the vessel "is comparable to a charterer pro hac vice who can acquire no maritime lien in his own behalf." 227 F.2d 921 n.2 (citations omitted). However, this dictum referred to the charterer's right to acquire liens in its own behalf for advances to third parties, and none of the cases cited as authority for this dictum hold that a bareboat charter cannot hold a lien for breach of the charter party.[9]

Sasportes v. M/V Sol De Copacababa, supra, restates the rule that an owner, part owner, or joint venturer cannot hold a maritime lien. 581 F.2d at 1207. No joint venture was found in *Sasportes* and the plaintiff was allowed a maritime lien.

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[9] We also note that in the first two cases cited, *Frontera Fruit Co. v. Dowling,* 91 F.2d 293 (5th Cir. 1937), and *Odysseus III,* 77 F. Supp. 297 (S.D. Fla. 1948), the owners *pro hac vice* had an interest in the vessel greater than that of a bareboat charterer. *Frontera Fruit,* distinguished *supra,* involved a joint venturer, and *Odysseus III* involved a part-owner seeking a lien against the vessel for advances. The other case cited, *The Fort Gaines,* 24 F.2d 438 (D. Md. 1928), did not involve an owner who was *pro hac vice.* Thus, none of these cases deal with the breach of a bareboat charter party by the owner.

Finally, in *Roberts v. Echternach*, 302 F.2d 370 (5th Cir. 1962), we held that third parties can acquire a lien for work done on a vessel at the owner's express request, despite the fact that the charter party contains a "prohibition of liens" clause. However, *Roberts* does not focus on maritime liens for claims brought on behalf of a bareboat charterer as a result of the owner's breach.[10]

In sum, we find none of these cases relied upon by the district court to be applicable to the case at hand, nor do they controvert the previously discussed authority giving rise to liens for breaches of bareboat charters. Therefore, we hold that IMT is not prevented from having a maritime lien on the M/V KING'S CHALLENGER as a matter of law.

The district court also found that the "prohibition of liens" clause contained in the charter party bars IMT's lien for Southern Leasing's breach of the charter. Section 7.3 of the charter party between IMT and Southern Leasing provides:

> Neither the Charterer nor the Master of the Vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except the crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance....The Charterer agrees to notify any person furnishing repairs,

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[10] In dicta, *Roberts* marked that, as a general proposition, a bareboat charterer does not have authority to acquire a lien in his own behalf. The two cases cited for this proposition, however, do not hold that a bareboat charter, *as such*, cannot have such a lien. *Rubin Iron Works*, 100 F.2d 871 (5th Cir. 1938), denied a maritime lien for wages to the agent of a purchaser of a vessel. *Challenger v. Durno*, 227 F.2d 918 (5th Cir. 1955), has already been distinguished, *supra*.

> supplies, towage or other necessities to the Vessel that neither the Charterer nor the Master has any right to create, incur or permit to be imposed upon the Vessel any liens whatsoever except crews' wages and salvage as set forth hereinabove.

This clause does not undertake to deal with the power of the owner to subject his vessel to maritime liens through his breach of the charter. "That clause, and the two sections of the Maritime Lien Act upon which it operates, has to do with the power of others—master, agent, charterer, etc.—to subject the vessel to liens for work done by third parties at the request of those presuming to speak for the ship." *Roberts v. Echternach,* 302 F.2d 370, 372-73 (5th Cir. 1962) (footnote omitted). In fact, as Judge Brown noted with regard to the clause, "the circumstances in which the owner could restrict his own power [to subject the vessel to liens] are severely limited and one could safely say, never to permit the owner, as such, to obtain any advantage." *Id.* at 372.

We conclude that the clause does not speak to the issue of liens created by the owner's breach and does nothing to waive charterer's lien rights for damages caused by such a breach, especially considering our strong presumption against such a waiver. *See Inland Credit Corp. v. M/T Bow Egret,* 555 F.2d 1148, 1152, n. 4 (5th Cir. 1977). By its very terms, the clause deals only with the right of the charterer to create liens in favor of third parties, and does not bar the creation of liens in favor of IMT as a result of a breach of the charter party by Southern Leasing.

IV. CONCLUSION

In its brief, IMT requests that the judgment of the district court be reversed and that the case be remanded for

judgmment pursuant to the stipulation of fact and law entered into by IMT and Southern Leasing. Brief of IMT at 20. Because the district court erred in holding that IMT could not acquire a lien for breach of a bareboat charter party, we reverse. However, we decline to order that the portion of the judgment vacated by the district court be reinstated, preferring to leave the course of this litigation in the first instance to the district court.

REVERSED and REMANDED.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
SECTION "J"

INTERNATIONAL MARINE TOWING, INC.

VERSUS

SOUTHERN LEASING PARTNERS, LTD., ET AL

CONSOLIDATED WITH

CIVIL ACTION
NO. 80-318
SECTION "J"

FIRST MISSISSIPPI NATIONAL BANK

VERSUS

M/V KING'S CHALLENGER

OPINION

On August 31, 1978, the M/V KING'S CHALLENGER, owned by Southern Leasing Partners, Ltd. (SLP), was seized in Florida in connection with the foreclosure of a first preferred ship's mortgage by First Mississippi Nation Bank (FMNB). At the time of the seizure, the KING'S CHALLENGER was under bareboat charter to International Marine Towing, Inc. (IMT), said charter having been entered into on July 11, 1978. IMT therefore intervened in the FMNB seizure action and asserted a claim against SLP.

In December of 1978, all parties to the action except IMT agreed to settle the litigation, and it was decided that the vessel would not be sold but would be released for operation with all proceeds of its operation used to pay various claims. Since IMT's claim was not settled, however, it was necessary that bond be set and posted by FMNB to secure IMT's claim and thus obtain release of the vessel. Bond was set at $50,000.00.

In addition to its *in rem* action filed in Florida, IMT filed an *in personam* action in the Eastern District of Louisiana, action no. 78-3728, which was assigned to this Court. On October 10, 1979, a motion to transfer the Florida action to this district was filed and on October 12, 1979, FMNB filed a second suit in the Florida Court again seeking foreclosure of its first preferred ship's mortgage. The vessel was seized a second time and IMT did not intervene in this second seizure action by FMNB. On January 22, 1980, the Florida case was transferred in its entirety to the Eastern District of Louisiana (no. 81-318) and consolidated with the *in personam* action in this Court pursuant to the October 10, 1979, motion to transfer.

This consolidated action was scheduled for trial on September 21, 1981, but IMT and SLP advised the Court that they reached a settlement agreement concerning IMT's suit for breach of the bareboat charter by SLP. A sixty-day order of dismissal was entered on September 25, 1981, and on November 24, 1981, a stipulation of fact and law[1] was

[1] The Conclusions of Law state:

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any disputes which

filed by IMT and SLP and approved by this Court. FMNB now brings a motion to recall approval of the stipulation of fact and law and to cancel the $50,000.00 release bond it

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(Footnote 1 continued)
may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE,* 390 F. Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yahct HUCKSTER,* 249 F. Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The First Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement. and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather,* 97 U.S. 379, (1878). Since there were (sic) no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim. *Jordan v. Mayro N.E. Drilling, Mud, Chemical, and Engineering Service,* 214 F.2d 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER Only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem,* in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

posted before these actions were consolidated. FMNB asserts that the stipulation is erroneous as a matter of law in that it gives IMT a lien on the vessel and therefore the bond, and IMT cannot acquire such lien as a bareboat charterer. FMNB also asserts that such a lien is contrary to the terms of the bareboat charter party. We agree.

A bareboat or demise charter, by its terms, is an agreement which transfers the full possession and control of the vessel to the charterer for a period of time. Gilmore and Black, *The Law of Admiralty, 2nd Ed.*, §4-24; *Klishewich v. Mediterranean Agencies, Inc.*, 302 F. Supp. 712 (E.D.N.Y. 1969). Therefore, for all practical purposes, the charterer stands in the shoes of the owner while the vessel is under charter and the charterer cannot acquire a lien on the vessel in his own behalf. *Roberts v. Echternach*, 302 F.2d 370 (5th Cir., 1962); *Sasportes v. M/V Sol De Copacabana*, 581 F.2d 1204 (5th Cir., 1977) (holding that an owner, part owner or joint venturer who occupies a position akin to that of owner, cannot acquire a maritime lien on the vessel in his own behalf); *See: Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir., 1955). The Fifth Circuit, in *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir., 1937), found plaintiff to be in position of "owner" of the vessel and thus stated:

> Appellant, having the exclusive management and control of the vessel, bore the relationship of owner. While this relationship existed, appellant could not acquire any interest which would prejudice the mortgage lien retained by the seller. In these transactions it dealt with itself on the account of the ship, and no maritime lien could be asserted in its favor.

Though the contract of letting in *Frontera* was not

specifically termed a "demise", the Court stated that "no technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control..." Section 7 of the charter party provides, in part, that "Charterer shall have exclusive possession and control of the vessel, and if the vessel shall be manned, shall man and victual the vessel, at its own expense or by its procurement throughout the Charter period."

Since it stood in the place of owner while the vessel was under charter, IMT could not acquire a maritime lien in its own behalf. Further, IMT could not acquire such a lien by the express terms of the charter itself. Section 7.3 of the bareboat charter party provides:

> Neither the charterer nor the Master of the Vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except for crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance.

It is well recognized that most demise or bareboat charters provide that neither the master nor the charterer shall have the power to create liens on the vessel, the purpose and effect of such a provision being to prevent the arising of liens for repairs, supplies, and the like provided actual or constructive notice of the provision is given to persons dealing with the ship. Gilmore and Black, *supra*. IMT obviously had notice of the no-lien provision as it was the charterer in the agreement. Thus, since IMT stood in the position of owner as bareboat charterer, and since the bareboat charter specifically provides that the charterer

shall not have the power to create liens, the stipulation of November 24, 1981, is set aside only insofar as it recognizes a lien on the vessel, and therefore the bond posted by FMNB.

New Orleans, Louisiana, this the 16th day of March, 1982.

/S/ Signed

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
SECTION "J"

INTERNATIONAL MARINE TOWING, INC.

VERSUS

SOUTHERN LEASING PARTNERS, LTD., ET AL

CONSOLIDATED WITH

CIVIL ACTION
NO. 80-318
SECTION "J"

FIRST MISSISSIPPI NATIONAL BANK

VERSUS

M/V KING'S CHALLENGER

JUDGMENT

For the foregoing reasons, it is ordered that the stipulation of fact and law of November 24, 1981, is hereby VACATED only insofar as it recognizes a lien on the M/V KING'S CHALLENGER in favor of International Marine Towing, Inc.

New Orleans, Louisiana, this the 16th day of March, 1982.

/S/ Signed
UNITED STATES DISTRICT JUDGE